STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.
affirming the Kent County Circuit Court, Donald A. Johnston.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

CHRISTOPHER LAMAR HAWKINS,

Defendant-Appellee.

_____/

Supreme Court
No. 120437

Court of Appeals
No. 230839

Kent County Circuit
Court No. 99-122537-FH

APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)
Chief Appellate Attorney

T. Lynn Hopkins (P44771)
Assistant Prosecuting Attorney

Business Address:
82 Ionia NW
Suite 450
Grand Rapids, Mi 49503
(616) 336-3577

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes & Constitutional Provisions

Other Authorities

STATEMENT OF APPELLATE JURISDICTION

This matter is properly before the Court pursuant to the Court's order dated April 30, 2002, granting Plaintiff's Application for Leave to Appeal.

STATEMENT OF QUESTION PRESENTED

The search warrant statute authorizes a magistrate to issue a search warrant only when the supporting affidavit meets certain criteria. Current case law holds that when a magistrate violates the statute by issuing a search warrant on the basis of an affidavit that does not meet the statutory criteria, any evidence seized pursuant to the warrant must be suppressed. Did the Legislature intend to require an exclusionary sanction for violations of the statute?

The trial court did not answer this question.

The Court of Appeals did not answer this question.

Plaintiff-Appellant answers "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This case arose from an investigation into possible drug trafficking at a residence in Grand Rapids. Detective Todd Butler of the Grand Rapids Police Department received tips on two separate dates that drugs were being sold from 921 Humbolt by a suspect named "Chris." Detective Butler drafted an affidavit and search warrant and presented them to a magistrate, who authorized the search warrant. (8a-10a). Pursuant to the warrant, officers executed a search at the Humbolt address. Execution of the warrant resulted in the seizure of controlled substances, paraphernalia consistent with the trafficking of controlled substances, and several firearms. A preliminary examination was held, and Defendant was bound over for trial on charges of Possession With Intent to Deliver Less Than 50 Grams of Cocaine,[1] Maintaining a Drug House,[2] Felon in Possession of a Firearm,[3] Driving on a Suspended License,[4] two counts of Receiving and Concealing a Stolen Firearm,[5] and with being a second drug offender[6] and a fourth felony offender.[7]

In the Circuit Court, Defendant filed a motion to suppress challenging the sufficiency of the search warrant affidavit. The affidavit set forth the following statement of probable cause:

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[1] MCL 333.7401(2)(a)(iv) .

[2] MCL 333.7405(1)(d).

[3] MCL 750.224f.

[4] MCL 257.904(3)(b).

[5] MCL 750.535b.

[6] MCL 333.7413(2).

[7] MCL 769.12.

Your affiant is a Detective with the Grand Rapids Police Department, currently assigned to the Vice Unit. Your affiant has been a police officer for the past 9 ½ years and assigned to the Vice Unit for the past 4 ½ years. Your affiants [sic] primary function has been the investigation of violations of the controlled substance act. Your affiant has attended both Michigan State Police basic and advanced narcotics schools, had hands on training, and has been involved in hundreds of narcotics investigations during service as a Detective with the Grand Rapids Vice Unit and Michigan State Police Metropolitan Enforcement Team.

Your affiant is also knowledgeable of how drug houses operate as to the obtaining, processing, packaging, and distribution of cocaine. This knowledge further includes being familiar with the amounts of controlled substances a trafficker would have compared to a typical user of controlled substances.

The following facts are sworn to by your affiant in support of the issuance of this warrant:

1. Your affiant received information from an informant on 10/14/99 that the resident of 921 Humbolt S.E. was involved in the sale of narcotics. The informant stated the residence [sic] is selling the controlled substance crack cocaine. The informant described the resident and seller of the controlled substance as "Chris", B/M, approx. 20, 5'8", 170 lbs., medium build/complexion, short hair.

2. Your affiant met with a reliable and credible informant on 11/3/99. Your affiant was advised that the informant had observed the controlled substance cocaine available for sale from the residence within the past 36 hours.

3. Your affiant was advised by the informant the entry door to the suspects apartment has been reinforced to delay a police entry.

WHEREFORE, your affiant for the foregoing reasons does verily believe that evidence of further narcotics trafficking, proceeds of narcotics trafficking, and/or records/documents or other indicia of narcotics trafficking will be discovered within the above described premises and/or person(s). [9a-10a]

Defendant argued that the allegations in the affidavit were not sufficient to establish probable cause. Alternatively, Defendant argued that the affidavit failed to comply with the requirements of MCL 780.653. When a search warrant affidavit is based on information from an unnamed informant, §653 states that the affidavit must contain

> affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

The prosecution argued that the allegations in the affidavit were sufficient to establish probable cause to believe that evidence of drug trafficking would be found at the address to be searched. Alternatively, the prosecution argued that the warrant should be upheld under the good faith doctrine recognized by the United States Supreme Court. (16a-17a).

The trial court declined to apply the good faith doctrine; the court found that the warrant did not comply with MCL 780.653 and that the evidence should be suppressed as a result of the statutory violation. (23a-24a). The trial court granted Defendant's motion to suppress. Without the seized evidence, there was insufficient evidence to proceed against Defendant, and all charges against Defendant were dismissed. (26a).

The People appealed of right. The Court of Appeals affirmed the trial court's ruling. The Court agreed with the trial court that the affidavit did not comply with MCL 780.653. Relying on *People v Sloan*, 450 Mich 160, 183-184; 538 NW2d 380 (1995), the Court also agreed that the sanction for violation of §653 is suppression of any evidence seized in reliance on the defective search warrant. Because the Court found that suppression was required for the statutory violation, they declined to address the question of whether the good faith doctrine should be adopted in Michigan. (27a-29a).

The People sought leave to appeal to this Court. The Court granted the People's application for leave, limited to the issue of whether an exclusionary sanction should be imposed for a violation of MCL 780.653. (30a).

SUMMARY OF ARGUMENT

The issuance of a search warrant in Michigan is governed by both constitutional and statutory provisions. The federal and state constitutions establish the minimum standards for the issuance of a search warrant. In addition to these constitutional requirements, the Michigan Legislature has enacted a series of statutes which establish additional standards for search warrants issued by magistrates in this state. This Court has in the past employed the exclusionary rule as a sanction for violations of the search warrant statutes, based on the Court's belief that the exclusion of evidence was necessary to enforce compliance with the statutes. More recently, however, this Court has held that it is the duty of the Legislature, not the courts, to determine the appropriate remedy or sanction for violations of statutes.

The Legislature did not intend to impose an exclusionary sanction for violations of the search warrant statutes. Nothing in the express language of the statutes requires or even suggests an exclusionary sanction. To the contrary, statutes expressly impose criminal penalties against police officers who engage in misconduct in obtaining or executing a search warrant. The statutes which define the form and content of search warrants are directed toward the conduct of the magistrate who decides whether to issue the warrant, while the exclusionary sanction is intended to address the conduct of police officers. A police officer who requests a search warrant in good faith commits no misconduct; it is the magistrate who violates the statute by authorizing a search warrant which does not comply with the statutory requirements. Imposing an exclusionary penalty against the police does nothing to encourage the magistrate to fulfill his or her duty to ensure that search warrants meet the statutory requirements. The Legislature did not intend the exclusion of reliable and probative evidence as a sanction for a magistrate's failure to comply with the statutory requirements.

ARGUMENT

THE SEARCH WARRANT STATUTE AUTHORIZES A MAGISTRATE TO ISSUE A SEARCH WARRANT ONLY WHEN THE SUPPORTING AFFIDAVIT MEETS CERTAIN CRITERIA. CURRENT CASE LAW HOLDS THAT WHEN A MAGISTRATE VIOLATES THE STATUTE BY ISSUING A SEARCH WARRANT ON THE BASIS OF AN AFFIDAVIT THAT DOES NOT MEET THE STATUTORY CRITERIA, ANY EVIDENCE SEIZED PURSUANT TO THE WARRANT MUST BE SUPPRESSED. THE LEGISLATURE DID NOT INTEND TO REQUIRE AN EXCLUSIONARY SANCTION FOR VIOLATIONS OF THE STATUTE, AND THE CASES WHICH HAVE IMPOSED SUCH A SANCTION SHOULD BE OVERRULED.

The Fourth Amendment of the United States Constitution and Article I, section 11 of the Michigan Constitution establish the minimum standards for the issuance of a search warrant:

> [N]o warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV]
>
> No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. [Const 1963, art 1, §11]

In addition to these constitutional requirements, the Michigan Legislature has enacted a series of statutes which establish additional standards for search warrants issued by magistrates in this state. 1966 PA 189; MCL 780.651 *et seq.*[8] Michigan law currently holds that the sanction for a violation of the constitutional requirements for issuance of a search warrant is suppression of any

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[8] These statutes are reproduced in their entirety in the appendix. (31a-39a). The statutory provisions relevant to the issue raised in this case will be quoted and discussed in detail below.

evidence seized pursuant to the warrant.[9] *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). This Court has also employed the exclusionary rule as a sanction for violations of the search warrant statutes. *People v Sherbine*, 421 Mich 502; 364 NW2d 658 (1984); *People v Sloan*, 450 Mich 160, 183-184; 538 NW2d 380 (1995). More recently, however, this Court has held that it is the duty of the Legislature, not the courts, to determine the appropriate remedy or sanction for violations of statutes. *People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999); *People v Sobczak-Obetts*, 463 Mich 687; 625 NW2d 764 (2001); *People v Hamilton*, 465 Mich 526; 638 NW2d 92 (2002). The cases which have imposed an exclusionary sanction for violations of the search warrant statutes have done so with little or no consideration of whether the Legislature intended such a sanction.

In the present case, the trial court held that the affidavit submitted in support of the officer's request for a search warrant did not comply with the requirements of MCL 780.653. That statute states that

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

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[9] The Fourth Amendment does not require suppression as a sanction for all constitutional violations. In *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), the United States Supreme Court held that the Fourth Amendment exclusionary rule should not be applied to bar the use in the prosecution's case in chief of evidence obtained by officers acting in good faith and in reasonable reliance on a search warrant issued by a detached and neutral magistrate where the warrant was subsequently held to be unconstitutional. This Court has never directly addressed the question of whether the "good-faith exception" to the exclusionary rule applies under the Michigan Constitution. Various panels and judges of the Court of Appeals have urged the adoption of this exception on several occasions. *People v Sherf*, ___ Mich App ___; ___ NW2d ___; 2002 WL 1033950 (#234661, decided 5/21/02); *People v Nunez*, 242 Mich App 610, 624; 619 NW2d 550 (2000) (O'Connell, J, concurring); *People v Paladino*, 204 Mich App 505, 507; 516 NW2d 113 (1994); *People v Hellis*, 204 Mich App 505, 646-647; 536 NW2d 587 (1995) (O'Connell, J).

(a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

The trial court found that the affidavit in the present case was based on information from an unnamed informant, and that the affidavit did not contain affirmative allegations demonstrating the credibility of the informant or the reliability of the information. (19a). The People do not contest that finding. The affidavit did not meet the statutory criteria, and the magistrate erred by issuing a search warrant on the basis of this affidavit. The issue presented to this Court is whether the Legislature intended to require the exclusion of evidence obtained pursuant to a search warrant which was issued by a magistrate in violation of the search warrant statutes. Generally, this Court reviews a trial court's ruling on a motion to suppress for clear error. *Stevens, supra*, 460 Mich at 630. However, the issue presented here is solely question of law, which this Court reviews *de novo*. *Id.* at 631.

Before beginning the analysis of this issue, the People wish to address a point of terminology. This Court has on occasion made reference to an exclusionary "remedy" for statutory violations. *See, e.g., Sobczak-Obetts, supra,* 463 Mich at 710. The exclusion of material and probative evidence from a criminal proceeding is not a "remedy" for either a statutory or constitutional violation. It is not a curative measure flowing to the accused but a sanction imposed against the police in order to deter future conduct of the same sort. *Penn Bd of Probation and Parole v Scott,* 524 US 357, 362-363; 118 S Ct 2014; 141 L Ed 2d 344 (1998); *United States v Leon,* 468 US 897, 906; 104 S Ct 3405; 82 L Ed 2d 677 (1984); *Stevens,* 460 Mich at 635; *see also* Baughman, *The Emperor's Old Clothes: A Prosecutor's Reply to Mr.*

Leitman Concerning Exclusion of Evidence for Statutory Violations, 1999 Det CL Mich St ULR 701 (1999). The issue presented in this case is whether the Legislature intended to impose such a sanction against police officers who execute a search warrant which was issued by a magistrate in violation of the search warrant statutes.

The Development of Exclusionary Sanctions for Statutory Violations

The first case in which this Court imposed an exclusionary sanction for a statutory violation appears to be *People v Moten*, 233 Mich 169; 206 NW 506 (1925). *Moten* involved a search warrant issued pursuant to Michigan's prohibition act. That statute provided that the material facts alleged in the affidavit supporting the search warrant had to be recited within the body of the search warrant itself. *Id.* at 172; 1922 CL 7079(27). The Court found that the warrant issued in that case did not comply with the statutory requirements, and that the warrant was therefore invalid. Without analysis, the Court asserted that the evidence seized pursuant to the warrant was therefore inadmissible. The Court cited a single authority for that conclusion: *People v Knopka*, 220 Mich 540; 190 NW 731 (1922). 233 Mich at 174. However, the *Knopka* court found that the warrant in that case had been issued without a showing of probable cause, and was therefore *constitutionally* defective. *Knopka,* 220 Mich at 545. It appears that the *Moten* court simply adopted the exclusionary sanction imposed for the constitutional violation in *Knopka* without considering the distinction between constitutional and statutory violations. *Moten,* 233 Mich at 174; *see also Sobczak-Obetts, supra,* 463 Mich at 698 n 10.

A few months later in *People v Bules*, 234 Mich 335; 207 NW 818 (1926) the Court again imposed an exclusionary sanction for violation of the same statutory provision considered in *Moten*. Again, the Court engaged in no independent analysis to determine the appropriate

sanction for the statutory violation, but merely asserted that the evidence seized pursuant to the warrant was inadmissible, citing *Moten*. *Id.* The Court made no attempt in either of these cases to discern what sanction or remedy the Legislature had intended; indeed, the question of what sanction the Legislature intended is not even raised in either opinion.

Nearly half a century passed before this Court again imposed an exclusionary sanction for a purely statutory violation. In *People v Dixon*, 392 Mich 691; 222 NW2d 749 (1974), a police officer failed to inform the defendant of the right to post immediate bond for a misdemeanor traffic offense. The officer proceeded to book the defendant and to conduct an inventory search of the defendant's clothing in preparation for lodging the defendant in jail. During the inventory search, the officer discovered heroin in the defendant's possession. The Court held that the heroin should be suppressed in order to promote compliance with the interim bond statute. *Id.* at 705. The Court cited no Michigan authority in support of its application of the exclusionary sanction; the Court cited case law from other jurisdictions, but acknowledged in a footnote that many of the cited authorities involved *constitutional* violations rather than solely statutory violations. *Id.* at 704-705 & n 18. Again, the Court made no inquiry into what remedy or sanction the Michigan Legislature may have intended to impose for violation of the Michigan statute.

In 1984, the Court imposed an exclusionary sanction for violation of a former version of MCL 780.653, one of the series of statutes governing the issuance of search warrants. *People v Sherbine, supra*. At that time, MCL 780.653 provided:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him. The affidavit may be based upon reliable information supplied to the complainant from a credible person, named or unnamed, so long as the affidavit contains affirmative allegations that the person spoke with personal knowledge of the matters contained therein.

The Court found that the statute required an affirmative showing that an informant was a credible person, even where the informant was named in the affidavit. *Sherbine,* 421 Mich at 509-510. The Court found that the affidavit supporting the search warrant in that case failed to comply with that requirement, and that the warrant was therefore improperly issued. *Id.* at 511. The Court held that the evidence seized in reliance on the warrant must be suppressed. The Court cited *Dixon, supra,* as authority for imposing an exclusionary sanction for a statutory violation. 421 Mich. at 512. The Court also relied on a case from Oregon in which the Oregon Supreme Court had suppressed evidence on the grounds that a search warrant did not comply with the applicable statute. *Id.*, citing *State v Russell*, 293 Or 469; 650 P2d 79 (1982). In a footnote, the Court also cited *People v Chartrand*, 73 Mich App 645, 652; 252 NW2d 569, *lv den* 400 Mich 848 (1977) as authority for the suppression of evidence as a sanction for a statutory violation.

There are several problems with the Court's analysis of the suppression issue in *Sherbine*. As in the previous cases, the Court made no inquiry into whether the Legislature had intended an exclusionary sanction for violation of the search warrant statutes. Since the Court did not consider the issue of legislative intent, it failed to take into account a critical distinction between the Oregon statute at issue in *Russell, supra*, and the Michigan search warrant statutes. In *Russell*, the Oregon court held that the search warrant in that case had been issued in violation of ORS 133.545(3).[10] What this Court failed to consider was that the Oregon Legislature had expressly enacted an exclusionary sanction for violation of its search warrant statutes in ORS 133.673(1):

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[10] That statute provided, in relevant part, that "the affiant shall set forth facts bearing on any unnamed informant's reliability"

> Objections to use in evidence of things seized in violation of any of the provisions of ORS 133.525 to 133.703 shall be made by a *motion to suppress* which shall be heard and determined by any department of the trial court in advance of trial. [Emphasis added; *see Russell, supra*, 650 P2d at 82.]

The *Russell* court merely applied the Oregon statute as written; *Russell* does not stand for the proposition that a court is free to invent an exclusionary sanction for a statutory violation on its own authority where the Legislature which adopted the statute did not choose to impose such a sanction. There is no equivalent exclusionary provision in the Michigan search warrant statutes, nor did such a provision exist at the time *Sherbine* was decided. The *Russell* decision was not on point with the issue presented to this Court in *Sherbine*, and does not support this Court's decision to create an exclusionary sanction for a statutory violation without regard for the intent of the Legislature.

The *Sherbine* Court's reference to *People v Chartrand, supra*, was also inapposite. The Court cited *Chartrand* for the proposition that "[a]lthough the statute is constitutionally based, evidence may be excluded even if the constitutional standards are satisfied if there is noncompliance with the statute." 421 Mich at 511 n 18. *Chartrand* does not stand for that proposition. All that the Court of Appeals stated in *Chartrand* was that "[e]ven if constitutional standards are satisfied, it may still be asserted that the warrant was not proper under the pertinent Michigan statute." 73 Mich App at 645. The Court of Appeals simply made the mundane observation that a search warrant could violate the statute even if the warrant met constitutional standards. The Court of Appeals found that the search warrant in *Chartrand* did *not* violate the statute; consequently, they never addressed the question of what sanction should be imposed for a statutory violation. 73 Mich App at 653-654.

Neither *Chartrand* nor *Russell* supports the Court's application of an exclusionary sanction in *Sherbine*. What then of the third authority cited by the Court, *People v Dixon*? As noted above, *Dixon's* analysis was flawed because the Court failed in that case to consider the issue of legislative intent. Even assuming for the sake of argument that *Dixon* reached the right result (which the People do not concede), the statute at issue in *Dixon* differs significantly from the search warrant statutes at issue in *Sherbine* and in the case at bar. The statute at issue in *Dixon*, MCL 780.581, provided in relevant part:

> When any person is arrested without a warrant for any offense, violation of a city, village or township ordinance cognizable by a justice of the peace or a municipal judge, *the officer making the arrest shall take, without unnecessary delay, the person arrested before the most convenient magistrate* of the county in which the offense was committed to answer to the complaint made against him. [Emphasis added.]

In that statute, the Legislature chose to impose a specific, affirmative duty directly on a police officer who makes an arrest. In contrast, the search warrant statutes impose a duty on a *magistrate*, not on a police officer. As noted above, the issuance of search warrants is addressed by a series of statutes, originally enacted together as 1966 PA 189. (*See* Appendix, pp 31a-39a). The first paragraph of the first statute in that act defines a magistrate's authority to issue a search warrant:

> *When an affidavit . . . establishes grounds for issuing a warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant* to search the house, building, or other location or place where the property or thing to be searched for and seized is situated. [MCL 780.651(1), emphasis added.] [11]

The statute states clearly that when two conditions are met – the affidavit complies with the search warrant act, and the magistrate finds probable cause for a search – then the magistrate

shall issue a warrant. Nothing in the statute authorizes a magistrate to issue a warrant when either of those conditions is lacking. The Legislature set forth the criteria for an affidavit which "establishes grounds for issuing a warrant pursuant to this act," *id.*, in MCL 780.653:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

It is significant that this statute does not refer at all to police officers, or even to the affiant. The statute does *not* state that that an affiant may not present an affidavit which does not include the prescribed allegations. Read in context with §651, this statute defines what constitutes an affidavit sufficient to satisfy one of the two conditions which must be met before a magistrate may issue a search warrant. When a police officer requests a search warrant and submits an affidavit which does not meet the criteria of §653, it is the *magistrate* who violates the statute by issuing a search warrant without the statutory conditions set forth in §651 being met.

The fact that the statute at issue in *Dixon* expressly imposed a duty directly on a police officer making an arrest arguably provides at least some support for the proposition that the Legislature may have intended to impose an exclusionary sanction for an officer's violation of that affirmative duty. However, since neither the *Dixon* court nor the *Sherbine* court considered the issue of legislative intent at all, the *Sherbine* court did not consider or even acknowledge the

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[11] The complete statute is reproduced in the Appendix, p 31a.

significant difference in the duties imposed by the search warrant statutes and the statute at issue in *Dixon*.

None of the three precedents cited by the *Sherbine* court support the Court's conclusion that the proper sanction for a violation of the search warrant statutes is the suppression of evidence. However, *Sherbine* formed the sole basis for this Court's most recent application of the exclusionary sanction for violation of the search warrant statute in *People v Sloan, supra.*

The primary issue in *Sloan* was whether an affidavit could be supplemented by oral statements made by the affiant to the magistrate under oath before the search warrant was issued. 450 Mich at 163. This Court held that such statements could be considered only if the statements were contemporaneously recorded in some manner. *Id.* at 182. In *Sloan*, no record was made of the supplementary testimony provided to the magistrate by the affiant, and this Court held that the unrecorded statements could not be considered in determining whether the affidavit complied with MCL 780.653. The Court found that the affidavit on its face did not comply with §653, and observed that it had previously held in *Sherbine*, *supra,* that evidence obtained in violation of §653 should be suppressed. 450 Mich at 182-183. The Court noted that after the decision in *Sherbine* the Legislature amended portions of the search warrant statute, but did not address the issue of the sanction to be imposed for a violation of the statute. The *Sloan* Court concluded that if the Legislature disagreed with the exclusionary remedy applied in *Sherbine*, it would have changed the statute. Since the Legislature did not do so, it must have approved of the exclusionary sanction. *Id.* at 183-184.

The *Sloan* court was the first to consider the question of the legislative intent with regard to the sanction to be imposed for a violation of the search warrant statute. However, the Court's analysis of the Legislature's intent consisted solely of a reference to the "legislative

acquiescence" doctrine. That doctrine holds that where some provision of a statute has been construed by the courts and the Legislature subsequently amends the statute without changing that provision, it may be assumed that the Legislature was aware of the judicial construction of the provision and that the Legislature's decision *not* to amend that provision indicates agreement with the judicial construction. *Jarvis v Providence Hosp*, 178 Mich App 586, 597; 444 NW2d 236 (1989). This Court has strongly and expressly disapproved of this approach. *See Donajkowski v Alpena Power Company*, 460 Mich 243, 258-262; 592 NW2d 574 (1999), and cases cited therein. In *Donajkowski*, this Court held that "'legislative acquiescence' is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." *Id.* at 261 (emphasis in original). *Sloan's* exclusive reliance on the legislative acquiescence doctrine makes its conclusions about the intent of the Legislature unreliable.

The development of the case law imposing exclusionary sanctions for statutory violations has been marked by less than careful analysis and reliance on precedents and doctrines which provide little authoritative support for the imposition of such sanctions. The Court's approach in those cases was essentially to decide as a matter of policy that the exclusion of evidence was the appropriate sanction to impose in order to encourage compliance with the statute, and then look to precedent to support the Court's assumption that it had the authority to impose such a sanction. As far as the People have been able to determine, this Court has never clearly identified the constitutional source of its assumed authority to create exclusionary sanctions for statutory violations in the absence of any evidence that the Legislature intended such a sanction. Some commentators have questioned whether courts have such constitutional authority.

Baughman, *supra*; Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum L Rev 1433 (1984).

Without directly addressing the complex question of whether the court has the constitutional authority to create exclusionary sanctions for statutory violations, this Court has begun to question whether courts *should* create such sanctions. Since 1999, this Court has held repeatedly that it is the role of the Legislature, not the courts, to decide what sanctions or remedies should be imposed for a violation of a statute.

Legislative Intent: *Stevens* and its Progeny

In *People v Stevens, supra,* this Court considered whether suppression of evidence was an appropriate sanction for a violation of the knock and announce statute.[12] The Court held that the question of the sanction to be applied for violation of a statute is a matter of interpreting the statute to determine the intent of the Legislature. 460 Mich at 643. Where the statutory intent is clear and unambiguous, judicial construction or interpretation is unnecessary and therefore precluded. *Id.*

In *Stevens*, this Court found that the Legislature had not chosen to mandate a sanction of suppression for violations of the statute, and nothing in the wording of the statute suggested that the Legislature had intended the courts to impose such a sanction. *Id.* at 645. The Court also emphasized that the harsh penalty of suppressing material and probative evidence must be exercised sparingly because it undermines the purpose of a criminal trial, which is the reliable

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[12] MCL 780.656 (reproduced in Appendix, p 37a).

determination of guilt or innocence. *Id.* The Court declined to impose an exclusionary sanction for a violation of the knock-and-announce statute absent some clear indication that the Legislature had intended that result. *Id.* at 647.

The Court applied a similar analysis in *People v Sobczak-Obetts*, *supra*, and again in *People v Hamilton, supra*. In *Sobczak-Obetts*, local police conducted an investigation in conjunction with federal authorities. The federal investigator obtained a search warrant from a federal magistrate; at the request of the federal investigator, the magistrate ordered the affidavit sealed. The local police and federal investigators executed the search warrant together. Pursuant to the federal magistrate's order sealing the affidavit, no copy of the affidavit was left at the location searched. 463 Mich at 689-691. Evidence was found which was subsequently used to charge the defendant with criminal offenses under Michigan statutes. The lower courts held that in order for the evidence to be used in a Michigan prosecution, the search warrant had to comply with Michigan's search warrant statutes even though the warrant was issued pursuant to federal law. *People v Sobczak-Obetts*, 238 Mich App 495, 496-504; 606 NW2d 658 (1999). Since Michigan law requires that a copy of the affidavit be left at the scene of the search[13] and the officers did not do so (as ordered by the federal magistrate), the Michigan statute was violated. Relying on *Moten*, *supra*, the lower courts suppressed the evidence seized during the execution of the warrant. *Id.*

This Court reversed. As in *Stevens*, *supra*, the Court approached the issue as a question of legislative intent, and found nothing in the language of the search warrant statutes to suggest that the Legislature intended such a sanction. 463 Mich at 697. The Court also emphasized that

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[13] MCL 680.655 (see Appendix, p 36a).

the statutory violation at issue in *Stevens* involved only a ministerial duty performed after the execution of the search warrant. The failure to leave a copy of the affidavit did not undermine the validity of the search warrant itself. *Id.* at 707-708.

In *Hamilton*, *supra*, the Court considered a statute[14] which restricts a police officer's statutory authority to make an arrest outside the officer's jurisdiction. 465 Mich at 530. In that case, an officer arrested the defendant for driving while intoxicated on a street that was outside the officer's jurisdiction. The lower courts held that the arrest was in violation of the statute, and suppressed the evidence seized as a result of the arrest. *Id.* at 528-529. This Court peremptorily reversed. The Court found that the arrest was based on probable cause and was therefore constitutional, *id.* at 533, and that there was nothing in the statute which indicated that the Legislature had intended to impose an exclusionary sanction solely on the grounds that the arrest was in violation of the statute. *Id.* at 534-535.

Stevens, Sobczak-Obetts, and *Hamilton* represent a significant shift in this Court's approach to determining the sanction to be imposed for violation of a statute. In the *Moten/Dixon* line of cases, this Court decided as a matter of policy that the most effective way to encourage compliance with a statute was to suppress evidence obtained as a result of a statutory violation. In *Stevens* and its progeny, the Court has recognized that just as it is the role of the Legislature to decide what statutes to adopt, it is also the role of the Legislature to decide what penalty should apply to a violation of those statutes. *Stevens*, 460 Mich at 645; *Sobczak-Obetts*, 463 Mich at 694-695; *Hamilton*, 465 Mich at 534-535. This brings us to the question to be

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[14] MCL 764.2a.

decided in this case: what penalty did the Legislature intend to impose for a violation of MCL 780.653?

Application of the Legislative Intent Analysis to MCL 780.651 *et seq.*

The specific statutory provision at issue in this case is MCL 780.653:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

As discussed above, this provision is part of a set of statutes adopted as a single legislative act. 1966 PA 189. The first section of the search warrant act establishes a magistrate's authority to issue search warrants:

> When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, *and the affidavit establishes grounds for issuing a warrant pursuant to this act*, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated. [MCL 780.651(1), emphasis added.] [15]

As discussed above, the statute establishes two criteria which must be met before a magistrate issues a search warrant – the affidavit must comply with the search warrant act, and the magistrate must find that probable cause exists for a search of the designated premises. MCL

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[15] The complete statute is reproduced in the Appendix, p 31a.

780.653 defines when an affidavit "establishes grounds for issuing a warrant pursuant to this act:"

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Read in context with §651, this statute defines what constitutes an affidavit sufficient to satisfy one of the two conditions which must be met before a magistrate may issue a search warrant. When a police officer requests a search warrant and submits an affidavit which does not meet the criteria of §653, it is the *magistrate* who violates the statute by issuing a search warrant without the statutory conditions set forth in §651 being met.

MCL 780.653 and MCL 780.656, the statutory provision considered in *Stevens*, are both sections within the search warrant act. 1966 PA 189. This Court found in *Stevens* that the Legislature chose not to mandate suppression of evidence as a sanction for a violation of §656. Nothing in the language of the statute suggests that the Legislature intended to impose an exclusionary sanction for violations of §653 even though it did not intend such a sanction for violation of §656. Section 656 expressly imposes a duty on the police officer executing the warrant, while §653 is directed toward the conduct of the magistrate. In *Stevens*, this Court found no intent to impose an exclusionary sanction even though it was the police officers themselves who violated the statute. In the present case, the trial court expressly found that the police officer engaged in no misconduct. (22a) It was the *magistrate* who violated the statute by

issuing the warrant on the basis of an affidavit which did not meet the statutory standards. A substantial amount of illegal drugs, drug paraphernalia, a stolen assault rifle, and two handguns (one stolen) were suppressed despite the fact that the police officer engaged in no misconduct, solely because the magistrate erred in authorizing the search warrant without requiring sufficient details regarding the credibility of the informant.

The purpose of the exclusionary rule is to deter police misconduct. The intent of the rule is to ensure that the prosecution is not put in a better position than it would have been if the violation in question had not occurred. *Stevens*, 460 Mich at 636-637. However, the suppression of evidence undermines the purposes of the criminal justice system if it is applied so as to place the prosecution in a worse position that it would have been in absent any violation. *Id.* at 637. Suppression of the evidence in this case has left the prosecution in a far worse position than it would have been had the magistrate's error never occurred. If the magistrate had fulfilled his duty under the statute, he would have declined to issue the warrant without further information about the informant. The police would then have been able to either correct the oversight in the affidavit or, if necessary, conduct further investigation. The magistrate's error cannot be corrected at this point, and highly probative and reliable evidence has been lost forever despite the fact that the police engaged in no misconduct.

Nothing in the language of the statute suggests that the Legislature intended to punish the police and the prosecution for a magistrate's failure to comply with the statute. The Legislature expressly provided penalties for individuals who engage in misconduct in obtaining or executing search warrants. In MCL 780.657, the Legislature provided that

> Any person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000.00 or imprisoned not more than 1 year.

In MCL 780.658, the Legislature provided that

> Any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000.00 or imprisoned not more than 1 year.

These statutes indicate that the Legislature considered the issue of the appropriate penalty to be imposed for misconduct by any person in obtaining or executing a search warrant. These statutes would directly address misconduct by police officers in obtaining search warrants. The statutory language makes it clear that the Legislature intended to punish only "malicious" procurement of a search warrant without probable cause; even in the case of malicious conduct, the sanction specified is a fine and/or imprisonment of the offending individual. The Legislature could have included an exclusionary sanction, as did the Oregon Legislature in the statute considered in *Dixon, supra*; it did not do so. These statutes provide strong evidence that the Legislature considered what sanctions should be imposed for police misconduct with regard to search warrants, and concluded that an exclusionary sanction was not justified.

It could be argued that the statutory sanctions adopted by the Legislature may be ineffective because the criminal penalties are rarely enforced. This argument is nothing more than an assertion that the Legislature made a bad policy decision in relying on criminal sanctions to ensure compliance with the search warrant statutes. Whatever the merits of that argument as a matter of policy, it *is* a matter of policy, and should be addressed to the Legislature. If the penalty statutes do not effectively serve the Legislature's purpose, the Legislature is free to amend them. It is not the role of this Court to judicially amend what the Court perceives to be a poorly written statute.

Conclusion

Nothing in the language of the search warrant statute suggests that the Legislature intended to impose the draconian sanction of the suppression of reliable and probative evidence on the basis of a magistrate's failure to comply with MCL 780.653. The police engage in no "misconduct" by presenting the affidavit to a magistrate and asking the magistrate to determine whether the affidavit establishes grounds for the issuance of a search warrant; police officers are not legal scholars, and it is the duty of the magistrate to decide whether statutory requirements for issuance of a warrant have been met. If a magistrate has found that the affidavit is sufficient to support issuance of the warrant, what more can the police do to insure that the warrant is valid? In the present case, the trial court effectively held that the police officer should have known the law better than the magistrate, should have known that the warrant was insufficient in spite of the magistrate's authorization, and should not have executed the search. Such a result defies logic and does nothing to further the intended purpose of the exclusionary rule – deterrence of police misconduct.

The current rule that violation of the search warrant statute mandates an exclusionary sanction is not based on any reliable interpretation of the intent of the Legislature. The rule results in the exclusion of material and probative evidence even in circumstances where the police have not engaged in any misconduct. The exclusionary sanction has a significant detrimental effect on the truth-finding function of the justice process by causing the suppression of highly probative evidence without any clear evidence that the Legislature intended that result. The People respectfully request that this Court overrule *People v Sherbine*, *supra* and *People v Sloan, supra*, to the extent that those decisions mandate an exclusionary sanction for violation of

the search warrant statues. Should the Court do so, we must then consider the question of the appropriate relief to be granted in the present case.

The trial court in this case found both a constitutional and a statutory violation. (23a-24a). In the Court of Appeals the People argued that suppression was not an appropriate sanction for the statutory violation. With regard to the constitutional issue, the People argued that Michigan should adopt the "good faith" exception to the exclusionary rule adopted by the United States Supreme Court in *Leon*, *supra*, (discussed above at p 6, n 9). The trial court expressly found that the officer in this case was acting in good faith. (23a). Under the "good faith" exception, evidence seized in good-faith reliance on a search warrant issued by a magistrate will not be suppressed even if a subsequent court finds that the magistrate's probable cause determination was erroneous. *Leon*, *supra*. The Court of Appeals found the statutory issue to be dispositive, and consequently did not address the issue of the "good faith" exception. (29a). The People sought leave to appeal to this Court, raising both the statutory sanction issue and the issue of the "good faith" exception. This Court granted leave, limited to the statutory issue. (30a).

In the event that we prevail on the statutory sanction issue, the People would normally request that this Court remand the case to the Court of Appeals for consideration of the "good faith" issue. However, the Court of Appeals has recently reaffirmed its position that it is precluded from adopting the "good faith" exception by an earlier decision. *Sherf, supra*, citing *People v Hill*, 192 Mich App 4; 480 NW2d 594 (1991). Absent that controlling authority, the *Sherf* Court would have adopted the "good faith" exception to the exclusionary rule. *Id.* No purpose would be served by remanding this case to the Court of Appeals for consideration of the "good faith" exception since the Court is compelled by precedent to reject that exception.

For this reason, the People respectfully request that rather than remanding this case to Court of Appeals, this Court reconsider its grant of leave in this case and allow the parties to brief and argue the question of whether the "good faith" exception to the exclusionary rule should apply to violations of Article I, section 11 of the Michigan Constitution. Alternatively, we would ask the Court to deprive *Hill*, *supra*, of precedential value to the extent that the opinion in that case precludes the adoption of the "good faith" exception, and to then remand this case to the Court of Appeals to directly address the merits of the "good faith" issue.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that this Court reconsider its grant of leave in this case and permit the parties to brief and argue the question of whether the "good faith" exception to the exclusionary rule should apply to violations of Article I, section 11 of the Michigan Constitution. Alternatively, we would ask the Court to deprive *Hill*, *supra*, of precedential value to the extent that the opinion in that case precludes the adoption of the "good faith" exception, and to then remand this case to the Court of Appeals to directly address the merits of the "good faith" issue.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)
Chief Appellate Attorney

Dated: June 19, 2002

By: _____
T. Lynn Hopkins (P44771)
Assistant Prosecuting Attorney